

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

Docket No. 170,144

ORDER

Claimant requested review of the Award dated March 18, 1997, entered by Administrative Law Judge Steven J. Howard. The Appeals Board heard oral argument on August 19, 1997, in Kansas City, Kansas.

APPEARANCES

George E. Mallon of Kansas City, Kansas, appeared for the claimant. Gary R. Terrill of Overland Park, Kansas, appeared for the respondent and its insurance carrier. Terri Z. Austenfeld of Overland Park, Kansas, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are set forth in the Award.

ISSUES

The Administrative Law Judge denied claimant's request for benefits on the basis claimant failed to prove he sustained any permanent disability as a result of either the June 6, 1990, accident or the alleged series of repetitive accidental injuries between June 6, 1990, and October 10, 1992. Claimant requested the Appeals Board to review that finding. The following issues are before the Appeals Board on this review:

1. Did claimant serve timely written claim upon respondent for the June 6, 1990, accident?
2. Did claimant sustain personal injury by accident arising out of and in the course of his employment with respondent as the result of a series of accidents between June 6, 1990, and October 10, 1992?
3. Did claimant timely notify respondent of the alleged series of accidents and, if not, did respondent experience prejudice as a result of that failure?
4. Did claimant miss the requisite time from work as a result of his alleged accidents or is he precluded from receiving permanent partial disability benefits as provided by K.S.A. 1989 Supp. 44-501(c)?
5. Is claimant entitled to an award for outstanding medical expense in the sum of \$2,146?
6. What is the nature and extent of claimant's injury and disability?
7. Is claimant entitled to unauthorized or future medical compensation?
8. What is the liability, if any, of the Workers Compensation Fund?

Findings Of Fact And Conclusions Of Law

After reviewing the entire record, the Appeals Board finds as follows:

The award should be modified to award claimant the medical expense incurred with P. E. Martin, M.D., and his referrals in June 1990.

Claimant alleges he is entitled to workers compensation benefits for injuries he received on June 6, 1990, when his truck struck another vehicle. Although he did not

experience pain at the time of the accident, that evening claimant's hips began hurting. The day after the accident claimant saw his family physician, Dr. Martin, who prescribed medications.

Claimant also alleges he is entitled to receive workers compensation benefits for injuries he allegedly received while continuing to work for respondent after the June 1990 accident and contends he sustained injury as the result of a series of repetitive trauma sustained from June 6, 1990, through October 10, 1992. The Appeals Board notes claimant continued to work for respondent performing his regular duties until his termination in March 1993. The record does not indicate the significance of the October 10, 1992, date.

As a result of the June 6, 1990, truck accident, claimant missed one day of work. Although Dr. Martin recommended that claimant stay home two or three days, he returned to his regular job duties after his boss's wife called and begged him to return to work because respondent needed him.

As time passed, claimant began to develop lower back pain and problems walking and getting out of his truck at the end of the workday. Claimant advised respondent of those problems and requested medical treatment which was denied. In September 1992, claimant returned to Dr. Martin for additional treatment and was later referred for a CAT scan and to F. M. Gilhousen, M.D., for treatment. Dr. Gilhousen referred claimant for an MRI. During this period of time, claimant missed a total of four days from work to see Drs. Martin and Gilhousen. The Appeals Board finds claimant missed those four days from work as a result of the second alleged accident rather than the first alleged accident of June 6, 1990.

Because claimant's doctors indicated surgery would be of no benefit, claimant continued to work for respondent until March 1993 when he reached the point he felt he could not continue. By that time, claimant's job had become more difficult as he was required to drive to off-road construction sites rather than on smoother public roadways. Claimant's symptoms had increased to the point where he had difficulty walking when he exited his truck.

After leaving respondent's employ, claimant first worked for Mo-Kan as a truck driver for approximately 6 to 12 months. Next, claimant worked at a trailer court performing light maintenance work for \$5.50 per hour until March 1994 when he found an over-the-road truck driving job with Clark Enterprises where he worked for approximately two years. At the time of the December 1996 regular hearing, claimant was unemployed and looking for a local truck driving position where he was not required to sit for long periods.

Respondent and its insurance carrier contend claimant failed to provide respondent with timely written claim for benefits. The Appeals Board disagrees and finds claimant served respondent with written claim in September 1990. That conclusion is based upon claimant's testimony coupled with the receipt of written claim entered into evidence at the December 1996 regular hearing which is signed and dated September 11, 1990.

Regarding the June 6, 1990, accident, the Appeals Board finds claimant is not entitled to receive any permanent partial disability benefits because the accident did not disable

claimant from earning full wages for at least one week as required by K.S.A. 1989 Supp. 44-501(c). The statute provides in pertinent part:

Except for liability for medical compensation, as provided for in K.S.A. 44-510 and amendments thereto, the employer shall not be liable under the workers compensation act in respect of any injury which does not disable the employee for a period of at least one week from earning full wages at the work at which the employee is employed.

However, claimant is entitled to an award for the medical expense he incurred with Dr. Martin and his referrals in June 1990 as a result of that accident.

Regarding the alleged series of accidents between June 6, 1990, and October 10, 1992, the Appeals Board agrees with the Administrative Law Judge that claimant has failed to prove he sustained permanent injury or disability.

The parties deposed only one physician, board-certified orthopedic surgeon Edward J. Prostic, M.D., who testified claimant had a 6 percent whole body functional impairment. He also testified claimant probably sustained a 0 to 3 percent whole body functional impairment as a result of the June 6, 1990, accident. He examined claimant in January 1996, almost three years after claimant left respondent's employment. He was not asked and, therefore, did not provide an opinion whether claimant sustained permanent injury as a result of repetitive trauma through the October 10, 1992, date.

The only other medical opinion in evidence is the January 4, 1995, report of orthopedist John A. Romito, M.D. He examined claimant in January 1995, almost two years after claimant left respondent's employment in March 1993 and after claimant had worked for at least three other employers. Dr. Romito wrote in his report that claimant had a 20 percent whole body functional impairment as a result of spinal stenosis and degenerative disease in the lumbar spine. However, he did not address the question whether claimant sustained permanent injury or impairment as a result of the work activities performed for respondent between June 6, 1990, and October 10, 1992.

When considering the entire record, the Appeals Board concludes that claimant has failed to satisfy his burden of proving permanent impairment or injury as a result of the alleged series of accidents. Further, because the medical evidence fails to prove claimant sustained a work-related injury through October 10, 1992, claimant's request for medical benefits for that alleged accident must, likewise, be denied.

Because of the above findings, the remaining issues are rendered moot. The Appeals Board hereby adopts the findings and conclusions set forth by the Administrative Law Judge in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated March 18, 1997, entered by Administrative Law Judge Steven J. Howard should be, and hereby is, modified to award claimant medical benefits for the treatment rendered by P. E. Martin, M.D., and his referrals in June 1990; and that the remainder of the Award entered by Judge Howard is affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER**DISSENT**

I respectfully dissent from the majority's interpretation of K.S.A. 1989 Supp. 44-501(c). The phrase "disable the employee for a period of at least one week from earning full wages" should be interpreted as meaning either that compensation is limited to medical benefits unless the disability prevents the employee from working for a full one-week period or that for a one-week period the employee must be disabled from earning **full wages**. I would find the latter. In this case, claimant missed at least one full day of work as a result of the June 6, 1990, truck accident. Thus, he was disabled from earning full wages that week. As such, the provisions of K.S.A. 1989 Supp. 44-501(c) do not preclude claimant from receiving permanent partial disability benefits.

BOARD MEMBER

c: George E. Mallon, Kansas City, KS
Gary R. Terrill, Overland Park, KS
Terri Z. Austenfeld, Overland Park, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director